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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

In re:

PG&E CORPORATION,

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

** All papers shall be filed in the Lead Case,
No. 19-30088 (DM).*

Bankruptcy Case
No. 19-30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN FURTHER
SUPPORT OF DEBTORS MOTION TO
ENFORCE THE AUTOMATIC STAY
AGAINST RICK BOWLINGER AND
BOTTINI & BOTTINI, INC.**

Date: April 24, 2019
Time: 9:30 a.m. (Pacific Time)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

PRELIMINARY STATEMENT¹

In their opening memorandum, the Debtors explained that Rick Bowlinger’s Derivative Action seeks to exercise control over property of their estates, and that his lawsuit is thus subject to the automatic stay under section 362(a)(3) of the Bankruptcy Code, just like the five other pending derivative lawsuits that have been filed by other shareholders on the Debtors’ behalf. After all, Bowlinger asserts his derivative claims *on behalf of the Debtors*, and seeks recovery of monetary damages that he contends are owed *to the Debtors*. Like any shareholder derivative plaintiff, Bowlinger thus seeks to displace the Debtors’ control over their own litigation claims—which are corporate assets—and instead assert and control those claims himself.

In opposition, Bowlinger argues that his Derivative Action should be exempt from the stay because he is not suing the Debtors, but instead asserting claims against their former and current officers and directors.² This argument fails because it ignores both the numerous cases from the Ninth Circuit and elsewhere making clear that derivative claims are a debtor’s property, and, more importantly, the plain language of section 362(a)(3) of the Bankruptcy Code, which—unlike section 362(a)(1)—does not merely stay actions “against the debtor,” but stays *any act* that seeks “to exercise control” over a debtor’s property. It further ignores the very nature of these chapter 11 proceedings, which upon commencement divested Bowlinger of any right to pursue derivative claims on the Debtors’ behalf: “[W]hile normally the fiduciary obligation of officers, directors and shareholders is enforceable directly by the corporation or through a stockholder’s derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee.” *Mitchell Excavators, Inc. by Mitchell v. Mitchell*, 734 F.2d 129, 131 (2d Cir. 1984) (internal quotations omitted). The few cases Bowlinger cites are distinguishable either because they are not *derivative* cases and/or

¹ Capitalized terms not defined herein are ascribed the meaning assigned to them in the Debtors’ Motion to Enforce the Automatic Stay against Rick Bowlinger and Bottini & Bottini, Inc. [Dkt No. 893] (the “**Motion**”).

² See Plaintiff Rick Bowlinger and Bottini & Bottini Inc.’s Memorandum of Points and Authorities in Opposition to the Debtors Motion to Enforce the Automatic Stay Pursuant to § 11 U.S.C. 362(a)(3) [Dkt No. 1321] (the “**Opposition**”), at 6-7.

1 because they do not apply section 362(a)(3) of the Bankruptcy Code.

2 The Debtors respectfully request that this Court declare that, as of the Petition Date,
3 section 362(a)(3) of the Bankruptcy Code automatically stayed the Derivative Action in its entirety,
4 and that any further acts or proceedings in the Derivative Action are void *ab initio*.

5 ARGUMENT

6 I. The Derivative Action is Property of the Debtors' Estates

7 As the Debtors described in their opening memorandum, section 362(a)(3) of the
8 Bankruptcy Code prohibits any act “to exercise control over the property of the estate.” Litigation
9 claims seeking to remedy harm incurred by a debtor are corporate property, controlled outside of
10 bankruptcy by management and/or the board of directors, and in bankruptcy by the debtor-in-
11 possession or trustee. *See Bader v. Anderson*, 179 Cal. App. 4th 775, 787 (2009) (citing *Grosset v.*
12 *Wenaas*, 42 Cal. 4th 1100, 1108 (2008)) (a board’s role necessarily includes managing the
13 “prosecution, defense and control of corporate litigation”); *In re Gen. Dev. Corp.*, 179 B.R. 335, 338
14 (S.D. Fla. 1995) (internal citations omitted) (“The bankruptcy trustee—or, as in this case, the debtor
15 in possession—is vested with title to all assets of the estate and becomes the estate’s legal
16 representative.”); *In re Polis*, 217 F.3d 899, 902 (7th Cir. 2000) (internal citations omitted) (legal
17 claims that arise pre-petition are “already ‘property’ of the debtor and hence of the debtor’s estate in
18 bankruptcy”).

19 Precisely because they are purportedly asserted on a company’s *behalf*, courts have
20 repeatedly and routinely confirmed that shareholder derivative litigation claims are property of a
21 company’s estate, and are thus stayed under section 362(a)(3) of the Bankruptcy Code. *See, e.g.*, *Mot.*
22 *at 4-5*; *In re At Home Corp.*, 154 Fed Appx. 666, 668 (9th Cir. 2005) (“A bankruptcy court may enjoin
23 a derivative claim brought by shareholders because the claim is property of the bankruptcy estate.”)
24 (citing 11 U.S.C. § 362(a)(3); *CAMOFI Master LDC v. Associated Third Party Adm’rs*, No. 16-cv-
25 00855-EMC, 2018 U.S. Dist. WL 839134, at *3 (N.D. Cal. Feb. 13, 2018) (quoting *Grosset*, 42 Cal.
26 4th at 1118) (“third parties may not bring derivative actions in bankruptcy” because they “belong[] to
27

1 the corporation, not the plaintiff asserting [them]”); *In re Grove Farm Fish & Poi, LLC*, Adv. No. 11-
2 90031, 2011 WL 3878358, at *1 (D. Haw. Aug. 31, 2011) (citing *In re Folks*, 211 B.R. 378, 384
3 (B.A.P. 9th Cir. 1997)) (“[A]ny derivative claims belong to the Debtor’s estate and only the Debtor
4 can assert them.”); *In re RNI Wind Down Corp.*, 348 B.R. 286, 293 (Bankr. D. Del. 2006) (internal
5 citations omitted) (section 362(a)(3) stayed derivative claims because “upon the filing of a bankruptcy
6 petition . . . any claims for injury to the debtor from actionable wrongs committed by the debtor’s
7 officers and director become property of the estate under 11 U.S.C. § 541”); *In re BICC Ltd.*
8 *Partnership*, 392 B.R. 209, 213 (Bankr. E.D. Va. 2008) (filing of derivative claims was “in violation
9 of the automatic stay” because plaintiff “in effect was attempting to obtain possession of property of
10 [the debtor’s] estate in contravention of Bankruptcy Code § 362(a)(3)”); *In re Gen. Dev. Corp.*, 179
11 B.R. at 338-340 (shareholders “lacked standing to maintain their derivative action” because “the
12 bankruptcy estate includes all legal claims owned by [the] corporate debtor, including derivative
13 actions”).

14 Here, Bowlinger asserts derivative claims for breach of fiduciary duty, abuse of control,
15 corporate waste, and unjust enrichment against the Debtors’ current and former officers and directors.
16 See Kramer Decl., Ex. A at 59-61. The Derivative Complaint expressly states that Bowlinger brings
17 these claims “derivatively on behalf of PG&E Corporation and Pacific Gas [and] Electric Company,”
18 and seeks “money damages” on behalf of PG&E. *Id.* at 5. These claims are in the heartland of the
19 Debtors’ property, and are subject to the automatic stay under the Bankruptcy Code.

20 Bowlinger tries to distinguish the cases cited by the Debtors that hold derivative claims
21 to be property of the estate, and thus stayed by section 362(a)(3) of the Bankruptcy Code, by arguing
22 that their findings are limited to circumstances in which the shareholder plaintiffs were also asserting
23 direct claims against the debtor. See Opp. at 6. But this assertion runs counter to the Bankruptcy
24 Code’s unqualified prohibition of “any act . . . to exercise control over property of the estate.” See 11
25 U.S.C. § 362(a)(3). This alone defeats Bowlinger’s contention that he can proceed with the Derivative
26 Action because he does not assert direct claims against the Debtors. See *BedRoc Ltd., LLC v. United*

1 *States*, 541 U.S. 176, 183 (2004) (plurality opinion) (internal citations omitted) (when confronted with
2 a question of statutory interpretation, a court’s “inquiry begins with the statutory text, and ends there
3 as well if the text is unambiguous”).

4 Moreover, consistent with the plain language of section 362(a)(3) of the Bankruptcy
5 Code, numerous courts have found the automatic stay applicable to derivative claims where the
6 shareholder plaintiff had no direct claims. *See, e.g., In re CIL, Ltd.*, No. 18-cv-2226, 2018 WL
7 2383102, at *4 (S.D.N.Y. May 4, 2018) (rejecting motion for leave to appeal order finding that stay
8 applied where plaintiff asserted only derivative claims: “[T]he law is clear that derivative claims are
9 assets of the [] estate and their prosecution violates the automatic stay”); *In re BICC*, 392 B.R. at 214-
10 215 (section 362(a)(3) of the Bankruptcy Code applied where shareholder asserted exclusively
11 derivative claims); *In re Gen. Dev. Corp.*, 179 B.R. at 337, 340 (shareholders “lacked standing to
12 maintain their derivative action” even where their only claims were “against [the debtor’s] directors
13 and officer, alleging civil racketeering and breach of fiduciary duty”).

14 Bowlinger separately attempts to distinguish the precedent relied upon by the Debtors
15 by contending those decisions only held that the automatic stay prevents shareholders from
16 prosecuting derivative claims because a trustee had been appointed. Again, this fundamentally
17 misconstrues the bankruptcy process. Courts make no distinction between “debtor” and “trustee” in
18 finding that only the estate’s designated legal representative has a right to bring claims on the debtor’s
19 behalf. *See, e.g., In re Gen. Dev. Corp.*, 179 B.R. at 338 (emphasis added) (internal citations omitted)
20 (“The bankruptcy trustee—or, as in this case, the debtor in possession—is vested with title to all assets
21 of the estate and becomes the estate’s legal representative. Derivative claims are among these assets.”)
22 (emphasis added); *In re Moore*, 608 F.3d 253, 261 (5th Cir. 2010) (emphasis added) (quoting *Nat’l*
23 *Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708–09 (7th Cir. 1994)) (“[T]he right to recoup a
24 fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the
25 estate that *only a trustee or debtor in possession* may pursue once a bankruptcy is under way.”); *In re*
26 *Black Elk Energy Offshore Op’s, LLC*, No. 15-34287, 2016 Bankr. WL 4055044, at *2 (Bankr. S.D.

1 Tex. July 26, 2016) (emphasis added) (“[I]t is the estate’s fiduciary (ordinarily, *a trustee or debtor-in-*
2 *possession*) that pursues derivative claims for the benefit of the estate”) (emphasis added).

3 In short, Bowlinger’s derivative claims are property of the Debtors’ estates, and section
4 362(a)(3) of the Bankruptcy Code mandates that the Derivative Action must be stayed, irrespective of
5 the Derivative Complaint’s lack of direct claims against the Debtors or the fact that no trustee has been
6 appointed.

7 **II. Section 362(a)(3) is Not Restricted to Actions “Against the Debtor”**

8 Bowlinger further argues that his derivative claims should be exempt from the stay
9 imposed by section 362(a)(3) of the Bankruptcy Code because they are purportedly brought for the
10 benefit of the Debtors, as opposed to “against the Debtors.” Opp. at 5-7. In addition to being refuted
11 by the authority cited above, this contention is also flatly contradicted by the statute.

12 Unlike section 362(a)(1) of the Bankruptcy Code, which automatically stays
13 proceedings only if they are “against the debtor,” section 362(a)(3) contains no such restriction. To
14 the contrary, it imposes—without qualification—a stay of “any act to obtain possession of property of
15 the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C.
16 § 362(a)(3). By its own terms, the statute applies equally to any act exercising control over estate
17 property, regardless of whether it is against or on behalf of the debtor. There is furthermore no dispute
18 that it is section 362(a)(3)—not section 362(a)(1)—that is the basis for the stay here. Mot. at 3-6.

19 The case law cited by Bowlinger finding that the automatic stay only applied to actions
20 “against the debtor” is wholly inapposite. The primary case upon which Bowlinger relies—*In re*
21 *Merrick*, 175 B.R. 333 (9th Cir. B.A.P. 1994)—is not a derivative case and did not consider whether
22 the automatic stay prohibits a shareholder’s prosecution of derivative claims on behalf of a debtor.
23 Instead, the court analyzed whether a defendant to a lawsuit *brought by the debtor* could *defend itself*
24 without violating the automatic stay. *Id.* at *336. While the debtor argued that the defendants’ motion
25 to dismiss constituted an “act to obtain possession of property of the estate or of property from the
26 estate or to exercise control over property of the estate,” the court rightly concluded that section
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362(a)(3) of the Bankruptcy Code did not apply because “a contention by a defendant that the trustee’s claim is unfounded [cannot] be equated with exercising dominion or control over property of the estate.” *Id.* *Merrick* is inapplicable here, where what Bowlinger seeks is to control claims on the Debtors’ behalf. Indeed, the *Merrick* panel *explicitly distinguished* its reasoning from a Fifth Circuit decision that held that section 362(a)(3) of the Bankruptcy Code stayed a creditor “from prosecution for its own benefit of [a] cause of action against non-debtor defendants [because it] was property of the estate.” *Merrick*, 175 B.R. at 337 (distinguishing *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987)).

The other cases cited by Bowlinger all fail even to address section 362(a)(3) of the Bankruptcy Code, much less to conclude that it does not apply to derivative claims. *See* Opp. at 8; *Fang Liu v. Gold*, No. C14-1087-JCC, 2014 U.S. Dist. WL 6609467, at *1 (W.D. Wash. Nov. 21, 2014) (finding that section 362(a)(1) did not stay derivative action because it “is not a case against [the debtor]”); *Walters v. First Tenn. Bank, N.A.*, 855 F.2d 267, 271 (6th Cir. 1988) (no mention of section 362(a)(3) or whether derivative claims are property of the estate); *Gershman v. Kiam*, 40 Conn. Supp. 327, 329 (Super. Ct. 1985) (same); *Ruskay v. Bennett*, 73 A.D.2d 519 (1979) (same); *In re Miller*, 397 F.3d 726 (9th Cir. 2005) (no mention of section 362(a)(3) in non-derivative action). In stark contrast to the numerous cases cited by Debtors holding that the statute requires derivative claims to be stayed, the Opposition does not identify a single case where a court considered section 362(a)(3) of the Bankruptcy Code and concluded that a shareholder could continue to prosecute a derivative claim on behalf of a debtor.

III. Debtors’ Bankruptcy Petition Extinguished Bowlinger’s Right to Bring Derivative Claims

Finally, Bowlinger maintains in his Opposition that because of the so-called “dual nature” of derivative claims, he possesses a right as a shareholder “to compel the Utility’s directors to sue the wrongdoers” through his Derivative Action, and that this “right” is not solely the Debtors’ property nor subject to section 362(a)(3) of the Bankruptcy Code. Opp. at 2. But Bowlinger cites no

1 case for this proposition, and there is none. To the contrary, as the cases make clear, whatever pre-
2 petition right Bowlinger may have had to try and plead a derivative claim was extinguished by the
3 Debtors filing of their chapter 11 petitions:

4 [T]he filing of the bankruptcy petition instantly alters the rights of a
5 corporation and its creditors. As a general rule, and outside the
6 context of a bankruptcy case, the fiduciary obligation of officers,
7 directors, and shareholders is enforceable directly by the corporation
8 or through a stockholder's derivative action. *However, it is, in the event of bankruptcy of the corporation, enforceable by the trustee.* For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.

9 *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (emphasis added); *see also*
10 *Mitchell Excavators*, 734 F.2d at 131 (quoting *Pepper v. Litton*, 308 U.S. 295, 306–07 (1939))
11 (“[W]hile normally the fiduciary obligation of officers, directors and shareholders ‘is enforceable
12 directly by the corporation or through a stockholder’s derivative action, it is, in the event of bankruptcy
13 of the corporation, enforceable by the trustee.”); *In re Gen. Dev. Corp.*, 179 B.R. at 339 (“[The
14 debtor’s] bankruptcy extinguished [the shareholders’] right to maintain their derivative action.”).

15 While Bowlinger suggests in his Opposition that the fact that he filed the Derivative
16 Action pre-petition exempts it from the stay triggered by the bankruptcy, *see* Opp. at 7-8, neither the
17 timing of his lawsuit nor the fact that his asserted claims arose pre-petition makes any difference at
18 all. Section 362(a)(3) of the Bankruptcy Code applies to “any act . . . to exercise control over property
19 of the estate.” As noted above, the filing of a bankruptcy petition fundamentally alters a shareholder’s
20 right to pursue derivative claims, regardless of whether such claims are already pending. *See, e.g., In*
21 *re RNI Wind Down Corp.*, 348 B.R. at 293 (section 362(a)(3) of the Bankruptcy Code stayed derivative
22 claims because “upon the filing of a bankruptcy petition . . . any claims for injury to the debtor from
23 actionable wrongs committed by the debtor’s officers and director become property of the estate”); *In*
24 *re Grove Farm*, 2011 Bankr. WL 3878358, at *1 (staying pending derivative litigation where plaintiff
25 sought permission “to continue” prosecuting his claims). Indeed, Bowlinger’s position would render

1 section 362(a)(3) of the Bankruptcy Code a dead letter, as a shareholder (or any claimant) could avoid
2 the stay merely by asserting that its claims pre-dated the bankruptcy petition.

3 The Debtors' filing of bankruptcy petitions on January 29, 2019, necessarily suspended
4 Bowlinger's ability to prosecute further his lawsuit in the Debtors' name and on their behalf, and this
5 Court should now grant the Debtors' Motion and reject Bowlinger's attempt to circumvent the
6 automatic stay.

7 **CONCLUSION**

8 For the foregoing reasons, the Debtors respectfully request that this Court grant the
9 Motion and enter an order substantially in the form of the Proposed Order attached as its Exhibit A
10 thereto.

11 Dated: April 17, 2019

12 **WEIL, GOTSHAL & MANGES LLP**

13 **KELLER & BENVENUTTI LLP**

14
15 /s/ Peter J. Benvenutti

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